

Waste Management of Northwest Louisiana, Inc., Employer and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Petitioner. Case 15-RC-8099

September 30, 1998

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

The National Labor Relations Board, by a three-member panel, has considered objections to an election held February 26, 1998, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 18 for and 17 against the Petitioner, with no challenged ballots.

The Board has reviewed the record in light of the Employer's exceptions and brief, has adopted the hearing officer's findings¹ and recommendations, and finds that a certification of representative should be issued.

The hearing officer recommended overruling the Employer's objections which allege, in composite, that employee David Lenard was deprived of the opportunity to cast a determinative vote by conduct attributable to the Employer. Lenard was on disability leave for approximately 4 months prior to the election. On February 23, 1998,² he brought a medical release from his personal doctor to the facility and presented it to Supervisor Shelton Thigpen. Thigpen advised him that he would have to pass a physical examination administered by a company physician before he could return to work. On February 25, Lenard informed the Employer's Regional Compliance Coordinator Kelly Calmes that he had passed the required physical. Calmes instructed him to return to work the next day at 8 a.m. The election was scheduled to take place on February 26, from 4 to 7:30 a.m. Lenard arrived at the facility at approximately 7:40 a.m., after the polls were closed, and he was not allowed to vote.

The hearing officer found no evidence that the Employer did anything to prevent Lenard from voting or that it interfered with the Board's election processes. The hearing officer found that the Employer had complied with its only obligation to inform voters of the election, i.e., to post notices. The hearing officer further found implausible Lenard's testimony that he had no knowledge of the election prior to his arrival at the facility on February 26.

¹ The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

² All dates hereafter are in 1998 unless otherwise specified

It is well established that when the conduct of a party to the election causes an employee to miss his opportunity to vote, the Board will set aside the results of the election if the employee's vote would have been determinative of the outcome of the election.³ When an employee does not vote for reasons that are beyond the control of a party or the Board, however, the failure to vote is not a basis for setting aside the election.⁴ The burden is on the objecting party, in this case the Employer, to come forward with evidence in support of its objection.⁵ Applying these principles here, we find, in agreement with the hearing officer, that the Employer has failed to meet its burden of showing that Lenard's failure to vote was due to conduct of any party to the election. Indeed, there has been no showing that the Employer's directive to report to work at 8:00 a.m. on the day of the election precluded Lenard from arriving earlier in order to vote. In fact, the record shows that Lenard arrived at 7:40 a.m., 20 minutes earlier than directed. Moreover, there is no contention that the Union prevented Lenard from voting.

In view of the absence of evidence that Lenard was prevented from voting by conduct attributable to any party to the election, we find it unnecessary to rely on the hearing officer's analysis of Lenard's testimony concerning his knowledge of the election. Even assuming Lenard had no knowledge of the election, this fact would not be sufficient to establish that his failure to vote was due to conduct by the Employer.

Accordingly, having found that the evidence is insufficient to show that Lenard was prevented from voting in the election, we shall overrule the Employer's objections and issue a certification of representative.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

³ *Versail Mfg.*, 212 NLRB 592, 593 (1974); *Sahuaro Petroleum*, 306 NLRB 586, 586-587 (1992).

⁴ *Versail Mfg.*, supra.

⁵ *Sahuaro Petroleum*, supra at 587.

Recognizing that the Board does not generally consider objections based on the misconduct of the objecting party, the Employer contends that the instant circumstances constitute an exception to this rule because the objecting party has caused an employee to miss the opportunity to cast a determinative vote and there is no evidence of bad faith. As explained below, we find that Lenard was not prevented from voting by any conduct attributable to the Employer. Therefore, no issue is presented here as to whether the election can be set aside based on the objecting party's own conduct.

All full time drivers, mechanics, helpers and dispatchers employed by the Employer at its Shreveport, Louisiana facility; excluding all other employees, salesmen,

managers, office clerical employees, guards, professional employees, and supervisors as defined in the Act.